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No. 90-1271

In The Supreme Court of the United States October Term, 1990

NORFOLK AND WESTERN RAILWAY COMPANY
Petitioner,

v.

OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

CASES *Page*

Hanna v. Director, OWCP, 860 F.2d 88 (3d Cir. 1988) 5

Louisville & N. R.R. v. *Donovan*, No. 80-0611-L(G), *vacated on other grounds*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) 5

Mitchell v. Director, OWCP, 855 F.2d 485 (7th Cir. 1988) 5

Public Citizen v. *United States Dep't of Justice*, 491 U.S. 440, 105 L.Ed.2d 377 (1989) 2

Southard v. *Director, OWCP*, 732 F.2d 66 (6th Cir. 1984) 5

Stroh v. *Director, OWCP*, 810 F.2d 61 (3d Cir. 1987) 5

West Virginia Univ. Hosp., Inc. v. *Casey*, 59 U.S.L.W. 4180 (U.S. March. 19, 1991) 2

STATUTES AND OTHER AUTHORITIES

Black Lung Benefits Act § 402(d), 30 U.S.C. § 902(d) (1988) ..... *passim*

123 Cong. Rec. 24,239 (1977) 3

H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 308-309 4

S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 3

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As Petitioner, Norfolk and Western Railway Company ("NW"), and the Association of American Railroads ("AAR"), as *amicus curiae,* have demonstrated, this Court should grant the petition and review the Court of Appeals' manifestly erroneous interpretation of Section 402(d) of the Black Lung Benefits Act ("BLBA"), 30 U.S.C. § 902(d) (1988). The Court of Appeals' expansion of BLBA coverage to include common carrier railroad workers employed in the movement of coal in interstate commerce is not supported by the language of the Act and is patently contrary to the Act's purpose and legislative history. NW, along with the rest of the railroad industry, potentially will be exposed to thousands of claims for benefits from the large number of

railroad workers engaged in the movement of coal at or around mine sites and preparation facilities as a result of this erroneous decision.

Both the Federal Respondent and Respondent Roberson argue that the Court of Appeals' interpretation of "miner" to include railroad employees engaged in the interstate transportation of coal is consistent with the plain language, the legislative history, and Congress' purpose in enacting the statute. Both Respondents also deny that this case presents an issue of sufficient public importance to merit review. They, like the Court of Appeals below, are in error.

1. The Court of Appeals' erroneous interpretation of Section 402(d) of the BLBA is not supported by any permissible application of the "plain meaning" rule of statutory construction, as Respondents urge. Fed. Resp. Br. at 6-8; Roberson Br. at 7-8. It is certainly not self-evident that Congress intended the phrase "an individual who works or has worked in . . . transportation in or around a coal mine" to encompass an employee of a common carrier railroad who is present at a mine site or preparation facility solely to move coal away from such locations by means of instrumentalities of interstate commerce. The phrase is, at best, ambiguous. Neither Respondent nor the Court of Appeals has shown that it has a "clearly accepted meaning in both legislative and judicial practice." *Contrast West Virginia Univ. Hosp., Inc.* v. *Casey,* 59 U.S.L.W. 4180, 4184 (U.S. March. 19, 1991).

Moreover, examination of the legislative history and Congress' purpose in enacting the BLBA is essential to an accurate understanding of the statute's meaning, as this Court has repeatedly declared. *See, e.g., Public Citizen* v. *United States Dep't of Justice,* 491 U.S. 440, 105 L.Ed.2d 377, 391-92 (1989):

> As we said in *Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 459 (1892), "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe

> that the legislator intended to include the particular act."
>
> . . . Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co.* v. *United States,* 278 U.S. 41, 48 (1928) (Holmes, J.).

In hiding behind its invocation of "plain language", the Court of Appeals erroneously substituted its uninformed understanding of Congress' intent for that clearly expressed in the relevant legislative history.

2. The legislative history and purpose of the BLBA are flatly inconsistent with the Court of Appeals' decision. Congress cannot have spoken more directly. Both the key Congressional Report and the explanatory statement of the Act's leading spokesman, Senator Randolph, establish that, in including certain "transportation" workers within BLBA's coverage in the 1977 Amendments, Congress did not intend to encompass traditional railroad employees. *See* Petition at 10-12.

The Federal Respondent acknowledges, as he must, that the Senate Committee Report and the statement of Senator Randolph "speak restrictively of the contours of the amended definition's coverage of transportation workers." Fed. Resp. Br. at 9. In fact, the Senate Report states precisely that "[t]he [expanded definition of 'miner'] does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line unless such company also operates a mine." S. Rep. No. 209, 95th Cong., 1st Sess. 20-21 (1977). Senator Randolph emphasized this exclusion during floor debate: "Railroad, trucking, bargeline, and coke oven workers are not included in the definition [of 'miner']." 123 Cong. Rec. 24,239 (1977).

Nonetheless, the Federal Respondent, like the Court of Appeals below, would have this Court ignore these direct manifestations of Congress' intent to exclude rail workers from

the Act's coverage on the sole ground that there was no similar reference to rail employees in the Conference Report accompanying the 1977 Amendments. However, the language of that report establishes that the Conference Committee fully embraced the scope of the Senate bill, with its carefully crafted coverage provision and its exclusion of railroad workers: "The conference substitute conforms generally to the Senate amendment . . . ." H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 15 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 308-309. Neither Respondents nor the Court of Appeals below offers any evidence that the Conference Committee intended *sub silentio* to expand the definition of "miner" beyond that proposed by the Senate so as to include railroad employees. The only change to the Senate language made in conference was the addition of "an amendment to clarify that transportation and construction workers are covered only to the extent they work in or around a coal mine and are exposed to coal dust." *Ibid.* Thus, the Conference Committee, far from broadening the Senate's definition of "miner", narrowed that definition by clarifying the limited circumstances in which any "outside" transportation and construction workers can qualify for BLBA benefits.

3. Respondents' argument that inclusion of railroad workers under the BLBA is consistent with Congress' purpose in providing this federal benefit program flatly ignores the entire 20-year history of the Act. Congress initially enacted, and subsequently reenacted, the BLBA solely because of the perceived inadequacy of *state* workers' compensation programs for coal miners. Petition at 7-8. There is no evidence in the legislative history of the BLBA that Congress has ever expanded the coverage of the statute because of any perceived inadequacy in the panoply of *federal* health and welfare statutes covering railroad workers. *See* Petition at 9-10.[1]

4. The Federal Respondent asserts at page 7 n.4 of his Brief in Opposition that the decision below is consistent with previous decisions that have found various transportation workers to fall

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[1] Respondent Roberson suggests, at pages 5-6 of his Brief in Opposition, that Congress may well have intended to supplement federal health and welfare benefit programs for railroad workers by including them within BLBA's coverage. Notably, he cites to nothing in the Act's extensive legislative history to support any such conclusion.

within BLBA coverage. In fact, however, the cited decisions are inapposite; none involved a BLBA claim by a rail worker[2] against a railroad;[3] in none was the issue of Congress' intent with respect to the coverage of the rail industry under the BLBA even discussed. The only federal court that has directly decided this question,[4] apart from the Court of Appeals below, has rejected the interpretation of "miner" reached in this case by the Fourth Circuit.

5. Finally, Respondents seek to minimize the importance of the Court of Appeals' decision on the ground that "only a small group of railroad workers" will be benefited. Roberson Br. at 11; *see also* Fed. Resp. Br. at 6. There are already at least 174 pending BLBA claims against NW and other railroads throughout the industry. If the Court of Appeals' precedent-setting decision bringing the railroad industry within the Act's coverage is allowed to stand, any rail employee even remotely involved in the movement of coal from a mine site or processing plant or over the rail lines in between may well file a claim for black lung benefits.

The Federal Respondent is in error when he suggests that the "demanding tests of function and situs" (Fed. Resp. Br. at 13 n.7) will result in a narrow application of the BLBA to the

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[2] *See, e.g., Hanna* v. *Director, OWCP,* 860 F.2d 88 (3d Cir. 1988) (tug boat deck hand); *Stroh* v. *Director, OWCP,* 810 F.2d 61 (3d Cir. 1987) (self-employed trucker); *Southard* v. *Director, OWCP,* 732 F.2d 66 (6th Cir. 1984) (trucker employed by coal retailer).

[3] The Federal Respondent's description of *Mitchell* v. *Director, OWCP,* 855 F.2d 485 (7th Cir. 1988), at page 7 n.4 of his Brief in Opposition, as a case involving a "railroad employee" is potentially misleading. While the employee in question in *Mitchell* was technically employed by a railroad, the BLBA claim was brought by his widow against Old Ben Coal Company, not against the railroad. The Seventh Circuit, in upholding his claim against Old Ben, focussed on the fact that Mitchell was *de facto* an employee of the coal company during the period he cleaned railroad cars, finding that he "worked under the direction of Old Ben employees at Old Ben's mine site and on Old Ben's time schedule." *Id.* at 490. Thus, the issue of the application of the BLBA to traditional railroad employees, such as Roberson, was not considered by the court.

[4] *Louisville & N. R.R.* v. *Donovan,* No. 80-0611-L(G) (W.D. Ky. 1981) (Pet. App. 11a-16a), *vacated on other grounds,* 713 F.2d 1243 (6th Cir. 1983), *cert. denied,* 466 U.S. 936 (1984).

rail industry. In this case, Olen Roberson was found to have satisfied the "situs" test even though he was involved in the movement of coal over 36 miles of interstate rail line between a coal mine and a preparation plant. NW has thousands of employees similarly involved in the transportation of coal between coal mines and preparation plants.

The so-called "function" test provides no meaningful limitation either, encompassing, as the Fourth Circuit has ruled, such traditional preparatory train movement activities as "coupling and uncoupling high pressure air hoses between cars, . . . setting and releasing brakes, and obtaining loading numbers and tags from the individual cars" when they occur at either coal mines or processing facilities. Pet. App. 13a. There are thousands of employees throughout the rail industry who are engaged in such activities at preparation plants in connection with the transportation of shipments of processed coal to ultimate consumers and, according to the Fourth Circuit, have contact with coal before it is finally "prepared and reloaded for shipment." Pet. App. 10a. *See generally* AAR Br. at 15-18.

NW and other railroads should not be burdened with BLBA claims and proceedings where the statutory language and history of the Act provide no basis for including railroad workers within its coverage. Congress did not intend for the BLBA to apply to the railroad industry. This Court should halt the erroneous expansion of the BLBA triggered by the Court of Appeals' decision and limit the BLBA to its Congressionally intended beneficiaries.

CONCLUSION

For the reasons set forth herein and in NW's petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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